rejected Petitioners' proffered approach, deferring to the agencies' general regulatory judgments and site-specific ecological assessments. There is no reason for the Court to revisit this settled issue.

ARGUMENT

I. A BROAD INTERPRETATION OF THE TERM "WATERS OF THE UNITED STATES" IS PIVOTAL TO THE NATION'S WATER POLLUTION CONTROL EFFORTS.

Although focused on jurisdictional wetlands, these cases have vastly broader and more troubling implications. Petitioners essentially ask the Court to rewrite and restrict the definition of "waters of the United States," a phrase that governs not only the jurisdictional scope of section 404 "dredge and fill" permits like the ones at issue here, but also every other pollution protection program established by the Act. A decision by the Court to cast aside more than three decades of settled administrative and judicial interpretations of the phrase "waters of the United States" would strike a crippling blow at the underpinnings of the Clean Water Act.

A. The Clean Water Act of 1972 Constituted a Radical Departure from Prior Federal Water Quality Laws and Enacted a Comprehensive Pollution Control Regime.

Adopted in the wake of burning rivers and toxic fish, the Clean Water Act discarded the ineffective approaches of the past and set a bold new course for cleanup of the nation's polluted waterways. The overarching objective of

the Clean Water Act is no less than "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, Congress declared the ambitious goals of attaining "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" by 1983 and eliminating altogether the discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a)(1)-(2). In addition to its aspirations of achieving "fishable" and "swimmable" waters, the statute also announced a new national policy of prohibiting "the discharge of toxic pollutants in toxic amounts." 33 U.S.C. § 1251(a)(3). Thus, as this Court has recognized, the contemporary Clean Water Act is a comprehensive pollution control law aimed at controlling commercial activities that previously evaded regulation under federal, state and local laws. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 310, 317-18 (1981) (finding that the 1972 amendments constituted "a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation"). *See also Environmental Protection Agency v. California*, 426 U.S. 200, 202 (1976) (discussing the ineffectiveness of pre-1972 state and federal water pollution control efforts); *Train v. City of New York*, 420 U.S. 35, 37 (1975) (stating that 1972 amendments "provide a comprehensive program for controlling and abating water pollution").[3]

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[3] The statute also directs the EPA Administrator, in cooperation with the states and others, to "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground water." 33 U.S.C. § 1252(a). These comprehensive programs must "conserve such waters for the protection

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To achieve these ends, Congress built the Clean Water Act's key provisions around the then-novel concept that, except as specifically allowed, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The pivotal term "discharge of pollutant" is statutorily defined as "any addition of any pollutant to navigable waters." 33 U.S.C. § 1362(12)(A). The term "navigable waters" is, in turn, defined by statute as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Thus, the scope of EPA's and the Corps' jurisdiction to regulate the discharge of any pollutant under the Clean Water Act is coextensive with the reach of the phrase "waters of the United States."

As this Court has recognized, "Congress evidently intended [in 1972] to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133 (citing S. Conf. Rep. No. 92-1236, at 144 (1972) and 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell)). These earlier statutes – particularly the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.*, and the Federal Water Pollution Control Act of 1948, as amended – were focused on waters that are or have been used, or may be susceptible for use,

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and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes." *Id.* Additionally, the statute funds basinwide water quality planning, to be done on a watershed basis taking into consideration "rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes, and portions thereof as well as the lands drained thereby." *Id.* § 1252(c).

to transport interstate commerce and were generally considered inadequate to regulate industrial pollutants.[4] Growing public concern over water quality and the inability of existing laws to effectively control pollutants at their source led directly to enactment of the new Clean Water Act in 1972, with its focus on the all-encompassing section 402 discharge permit program. *See* Gregory J. Hobbs, Jr. and Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. Colo. L. Rev. 841, 849 (1989).

B. Petitioners' Interpretation Would Eviscerate the Section 402 NPDES Permit Program, which Lies at the Heart of the Clean Water Act.

The NPDES program under section 402 is the cornerstone of the Clean Water Act's pollution control efforts, entirely replacing the Corps' nascent permit program

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[4] In the 1960's, the Corps began regulating industrial pollutants under section 13 of the Rivers and Harbors Act, 33 U.S.C. § 407, which prohibits the discharge of refuse (but not sewage) into navigable water and "any tributary of any navigable water from which the same shall float or be washed into such water." *See United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966) (release of aviation fuel into river). However, the agency's attempt to develop a formal discharge permit program extending to both navigable waters and their tributaries was dealt a blow in *Kalur v. Resor*, 335 F. Supp. 1, 9 (D.D.C. 1971) (finding permit regulations adopted in 1971 to be *ultra vires*). *See also generally* Donna M. Downing, Cathy Winer, and Lance D. Wood, *Navigating Through Clean Water Act Jurisdiction: A Legal Review*, 23 Wetlands 475, 476-78 (Sept. 2003) (describing history of Rivers and Harbors Act and judicial interpretations of traditional navigability test); Maria V. Maurrase, *Oklahoma v. EPA: Does the Clean Water Act Provide an Effective Remedy to Downstream States or Is There Still Room Left for Federal Common Law?*, 45 U. Miami L. Rev. 1137, 1146-49 (1991) (describing inadequacies of pre-1972 Federal Water Pollution Control Act).

under the Rivers and Harbor Act. *See* 33 U.S.C. § 1342(a)(5).[5] It constitutes a comprehensive permit system for "the discharge of any pollutant" into waters of the United States, requiring that all such discharges comply with technology-based effluent limitations established by EPA for various industrial categories of "point sources." *Id.* § 1342(a)(1). NPDES permittees also must comply with backstop water-quality based effluent limitations, if and as necessary to protect public health, industrial and recreational uses, and ecological functions. *Id.* § 1312(a). The section 402 program broadly applies both to conventional pollutants, such as those commonly associated with sewage treatment activities and industrial operations, and to those dangerous chemical pollutants deemed "toxic" by the EPA Administrator. *Id.* § 1317(a)(1).

Petitioners' reading of the phrase "waters of the United States" to exclude non-navigable tributary waters and their adjacent wetlands based on geographic proximity (or, as the *Carabell* Petitioners apparently contend, failure to prove a robust hydrologic connection to directly adjacent waters) threatens to unravel the protections of the NPDES permit program. A watershed is a vast braided

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[5] The Clean Water Act dramatically changed the prior legal landscape by conferring on the newly-created EPA the responsibility for implementing the section 402 permit program and all other facets of the statute, save for the section 404 permit program. *See* 33 U.S.C. § 1251(d). Consistent with the Corps' historic role over dredge and fill activities in navigable waters, the Act conferred section 404 permitting authority on the Corps, but gave EPA ultimate veto authority over such permits. *Id.* § 1344(a)-(c). *See* 43 U.S. Op. Atty. Gen. 197, 201-02, 1979 WL 16529 (Sept. 5, 1979) (noting that the term "navigable waters" is the linchpin for all Clean Water Act programs and concluding that EPA, not the Corps, has the ultimate authority for a uniform definition of the term).

network of streams, wetlands, and pools, intertwining to form the great rivers, lakes, and estuaries downstream. Upstream tributary streams – which form at least 75 percent of the nation's stream miles – act as a complex living filter system and are biologically and hydrologically critical to gathering and gradually releasing the water that fills larger rivers and lakes, in the process removing pollutants and sediments. Judy L. Meyer et al., *Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands* 6-7, 10-15 (2003).[6] Downstream water quality depends on the protection of upstream areas and suffers if they are degraded. *See, e.g.*, Bruce J. Peterson et al., *Control of Nitrogen Export from Watersheds by Headwater Streams*, 292 Science 86, 89 (April 6, 2001) ("Restoration and preservation of small stream ecosystems should be a central focus of management strategies [to] . . . improve the quality of water delivered to downstream lakes, estuaries, and oceans" because nitrogen processing is much more rapid and effective in headwater tributaries"); EPA Region 3 Comments on Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" ("ANPRM") at 7 (pathogens from upstream sewage treatment facilities located on smaller order tributaries, such as many of the facilities in the Mid-Atlantic region, can survive long distances and end up in downstream drinking water); EPA Region 6 ANPRM Comments, Enclosure at 1.[7]

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[6] This publication is available at http://www.americanrivers.org/site/DocServer/WhereRiversAreBorn1.pdf?docID=182.

[7] On January 15, 2003, EPA and the Corps jointly published this advanced notice seeking public comment and soliciting technical information on potential regulatory changes or clarification in light of the Court's decision in *SWANCC*. 68 Fed. Reg. 1991 (Jan. 15, 2003). The

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Tens of thousands of NPDES permits have been issued across the nation, primarily by state agencies in the 45 states that have been delegated such permitting authority by EPA. Many of these permits regulate discharges into non-navigable tributaries, including discharges from both industrial processes and municipal sewage treatment facilities. *See, e.g.*, EPA Region 6 ANPRM Comments, Enclosure at Table 2. If the Court were to hold that distant, intermittent or artificial tributaries to navigable waters are excluded from the definition of "waters of the United States," many – if not most – of the nation's waters would lose the important protections of the NPDES program, virtually overnight. *See, e.g.*, EPA Region 1 ANPRM Comments, Attachment at 12 (explaining that publicly owned treatment works in New England could freely discharge poorly treated sewage if the NPDES program does not cover tributaries); EPA Region 9 ANPRM Comments at 12-13 (noting that major discharge sources in the region, such as mines and sewage treatment plants, would lose NPDES protection). For instance, Missouri has over 84,000 miles of intermittent/ephemeral streams and 82 percent of the state's NPDES permittees discharge to these streams; limiting the reach of the Clean Water Act to

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agencies received roughly 130,000 comments from the states, regional EPA offices, various stakeholders, and the general public overwhelmingly opposed to any regulatory change that would restrict the scope of the current definition. In this brief, *amici* cite to several of the federal and state agency comment letters, which are available at http://www.earthjustice.org/backgrounder/display.html?preview=yes&ID=143 (EPA regional office comments) and http://www.earthjustice.org/backgrounder/display.html?ID=68 (individual state comments), respectively, and are referenced herein as "ANPRM Comments." Ultimately, EPA decided not to move forward with any regulatory changes. *See* http://www.epa.gov/owow/wetlands/guidance/SWANCC/.

traditionally navigable waters could affect more than 76 percent of the state's headwaters or intermittent streams. Missouri ANPRM Comments at 2. Likewise, approximately 75 percent of the stream miles in Texas are intermittent and roughly 48 percent of the NPDES-permitted wastewater discharges flow into such intermittent streams. Texas ANPRM Comments at 2.

Indeed, while there are no definitive estimates of the nationwide impacts from the loss of Clean Water Act coverage for tributary systems and their adjacent wetlands, the numbers are likely quite high. In the New England region alone, EPA estimates that approximately 35,000 miles of non-navigable tributaries (and approximately 2,140,000 acres of their adjacent wetlands and other waters) would lose protection. EPA Region 1 ANPRM Comments at 3. On the other side of the continent, the State of Arizona has estimated that 95 percent of its surface waters are intermittent or ephemeral, all of which would fall outside the narrow definition that Petitioners advance, Arizona ANPRM Comments at 1, and the State of Montana estimates that limiting the definition of navigable waters to perennial or traditionally navigable rivers would eliminate Clean Water Act coverage for 71 percent of the state's stream miles. Montana ANPRM Comments at 4-5. In the nation's heartland, the same concerns hold true; for example, the State of Nebraska estimates that it would lose regulatory oversight of 76 percent of its waterways under even an "extremely conservative estimate" of the reach of a definition change. Nebraska ANPRM Comments at 2. Thus, virtually every region of the country would be significantly impacted by a narrowing of Clean Water Act jurisdiction, and many of the potentially unprotected waters serve as sources of drinking water. *See, e.g.*,

EPA Region 3 ANPRM Comments at 6 and Table 1 (demonstrating that between 148 and 526 surface drinking water intakes, serving populations ranging from 535,000 to 3 million people, are in headwaters streams and thus potentially affected by restrictions on Clean Water Act jurisdiction).

Elimination of Clean Water Act jurisdiction over non-navigable tributaries and their adjacent wetlands also would have a significant adverse effect on EPA's enforcement program, calling into question pending wetlands and NPDES enforcement cases. *See* EPA Region 1 ANPRM Comments at 14; EPA Region 9 ANPRM Comments at 12-13 (describing several such vulnerable enforcement actions). For instance, in *United States v. Eidson*, 108 F.3d 1336 (11th Cir.), *cert. denied*, 552 U.S. 899 (1997), a used oil company intentionally pumped industrial wastewater sludge containing priority pollutants into a storm sewer that drained into a storm drainage ditch which eventually emptied into Tampa Bay. The Eleventh Circuit upheld defendants' convictions, citing *Riverside Bayview* and EPA's long-established definition of "waters of the United States" to conclude that non-navigable tributaries to navigable waterways are covered by the Clean Water Act. *Id.* at 1342 (noting that "[p]ollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes"). Similar examples, spanning three decades of remarkable judicial consistency across the country, abound.[8] Petitioners' proposed reading of the term

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[8] *See, e.g., Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533-34 (9th Cir. 2001) (discharge of pesticide into irrigation canal without NPDES permit); *United States v. TGR Corp.*, 171 F.3d 762, 764-65 (2d Cir. 1999) (criminal conviction for the knowing discharge, without a permit, of asbestos waste slurry into a drain that flowed into

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"navigable waters" would imperil such enforcement actions and the nation's waters.

There simply is no question that "[n]atural and altered streams can serve as water pollution conduits, whether continuous or intermittent in their flow" and that "[m]an-made structures [such as ditches] ... have the same practical effect of direct connectivity in being pollution conduits." EPA Region 5 ANPRM Comments at 3. *See also* EPA Region 9 ANPRM Comments at 8-9 (explaining that nearly 20,000 miles of constructed drains and canals in California's Central Valley lie upstream of drinking water supplies for much of the state's population). The loss of section 402 protections for such non-navigable tributaries would set the country's water quality efforts back "to pre-1960's levels." EPA Region 7 ANPRM Comments at 5.

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a channelized brook that flowed into a tributary to the Long Island Sound); *Quivira Mining Co. v. U.S. Environmental Protection Agency*, 765 F.2d 126 (10th Cir. 1985) (uranium mining company discharge of pollutants into short-distance gullies or "arroyos"); *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979) (unpermitted discharge of oil); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979) (illegal discharge of toxic sodium cyanide-sodium hydroxide solution from gold mine leaching operation into a non-navigable creek); *United States v. Ashland Oil*, 504 F.2d 1317, 1325 (6th Cir. 1974) (conviction for the discharge of oil without a permit into an unnamed, non-navigable tributary where its waters flowed through three other waterways before reaching a navigable river); *United States v. Jones*, 267 F. Supp. 2d 1349 (M.D. Ga. 2003) (discharge to storm drain that flowed into tributary of navigable stream); *State of Georgia v. City of East Ridge*, 949 F. Supp. 1571 (N.D. Ga. 1996) (sewage discharge into storm drain that flowed to unnamed tributary of navigable-in-fact river); *United States v. St. Bernard Parish*, 589 F. Supp. 617 (D.C. La. 1984) (discharge to canal pumped to open water pools adjacent to wetland that was adjacent to navigable river).

C. Other Clean Water Act Provisions Are Similarly Dependent on a Broad Interpretation of Navigable Waters.

Sections 402 and 404 are not the only Clean Water Act programs whose effectiveness turns on the phrase "waters of the United States." For example, section 304 of the Clean Water Act mandates that, for navigable waters, states adopt and EPA approve water quality standards that "protect the public health or welfare [and] enhance the quality of water . . . taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2)(A). Additionally, states must develop "total maximum daily loads" ("TMDLs") for any waters that do not meet these standards and must implement these TMDLs through "waste allocations" incorporated into NPDES permits and their non-point source planning efforts. *Id.* § 1313(d).

Because many NPDES permit holders discharge into tributary streams, a statutory reinterpretation that leaves these streams unregulated will increase the pollutant load in downstream waters, leading to TMDL violations. *See, e.g.*, California ANPRM Comments at 9; Arizona ANPRM Comments at 3; Delaware ANPRM Comments at 14; Rhode Island ANPRM Comments at 1-2. For example, in the Christina River Basin that spans Pennsylvania, Maryland, and Delaware, TMDL modeling and analysis demonstrate that nutrients, dissolved oxygen, and dioxin all move into the river from upstream tributaries and must be controlled at their source to effectuate the clean-up envisioned by section 304. EPA Region 3 ANPRM

Comments at 14-15. *See also* EPA Region 1 ANPRM Comments at 13 (discussing effects on TMDL efforts to restore Long Island Sound).

Many other Clean Water Act programs would be similarly impacted by Petitioners' cramped interpretation of "navigable waters." For instance, section 401, 33 U.S.C. § 1341(a), requires states to certify that applications for federal permits and licences involving discharges into "navigable waters" will comply with the standards of the Clean Water Act. Because states often do not have the legal authority or the resources to step in and directly regulate the destruction of wetlands,[9] many have historically relied on section 401 as the primary mechanism for protecting wetlands and riparian areas. *See, e.g.*, Arizona ANPRM Comments at 3; California ANPRM Comments at 3; Hawaii ANPRM Comments at 3; Indiana ANPRM Comments at 8; Iowa ANPRM Comments at 2; Kentucky ANPRM Comments at 1; Maine ANPRM Comments at 1; Nebraska ANPRM Comments at 4; South Carolina ANPRM Comments at 1; Texas ANPRM Comments at 4; Wyoming ANPRM Comments at 5-6. The oil and hazardous substance discharge liability provisions of the Clean Water Act and the Oil Pollution Act also turn on the definition of "navigable water," 33 U.S.C. §§ 1321(b), 2702(a), as do provisions regulating sewage treatment facility discharges, 33 U.S.C. § 1345(a), and non-point source planning provisions. 33 U.S.C. § 1319(a). Each of

[9] Nebraska, for instance, protects only 2 percent of its wetlands through state programs, Nebraska ANPRM Comments at 4, and South Carolina has no regulatory program in place for 99 percent of its wetlands. South Carolina ANPRM Comments at 1. California, Wyoming, Montana, Arizona, and Texas have no state law in place. Respective State ANPRM Comments at 3, 6, 5, 2, and 4.

these programs is threatened if Petitioners' interpretation is adopted.

"Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source,'" *Riverside Bayview*, 474 U.S. at 132-33, and the legislative history of the Clean Water Act plainly evinces Congress' intent to control pollution in both navigable waters "and their tributaries." S. Rep. No. 92-414, at 77 (1972). Because tributary systems and their adjacent wetlands are "inseparably bound up with 'waters' of the United States," they fall within the statute's jurisdiction as already construed by this Court in *Riverside Bayview*, 474 U.S. at 134. *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987) (Clean Water Act "applies to virtually all surface water in the country"). *SWANCC* did not overrule *Riverside Bayview* nor did it otherwise alter this fundamental proposition.

II. THE FEDERAL GOVERNMENT'S CONSISTENT INTERPRETATION OF CLEAN WATER ACT JURISDICTION HAS RESULTED IN A ROBUST FEDERAL-STATE PARTNERSHIP FOR PROTECTING WATER QUALITY.

Petitioners contend that the government's application of the Clean Water Act to the facts of these cases "gives the Corps extraordinary power to regulate matters that have traditionally been exclusively reserved for regulation by the States" and "will extend federal authority over an enormous expanse of land." Petitioners' Brief in *Carabell* at 14. Such heated rhetoric incorrectly suggests that the Corps has engaged in an alarming departure from long-established regulatory practices. In truth, however, EPA

and the Corps have for decades interpreted the Clean Water Act's jurisdiction to reach tributary systems and their adjacent wetlands, such as the ones at issue here. The Court's decision in *SWANCC* does not dictate a different course now. Petitioners' call to ignore decades of settled judicial interpretation would effect a major shift in regulatory policy and largely leave the states adrift to regulate tributary systems and their adjacent wetlands at their own expense and on an *ad hoc* basis – precisely the failed regime that Congress overrode with passage of the Clean Water Act in 1972.

A. EPA and the Corps Have Consistently Asserted Jurisdiction Over Tributaries and their Adjacent Wetlands for Three Decades.

Soon after enactment of the Clean Water Act, EPA broadly defined "navigable waters" to include all navigable waters of the United States and all tributaries of such waters, as well as interstate waters and a variety of intrastate waters connected to interstate commerce. 38 Fed. Reg. 13,527, 13,529 (May 22, 1973). As then-EPA Administrator Russell Train later explained, "aquatic systems are . . . interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource." *Section 404 of the Federal Water Pollution Control Act Amendment of 1972: Hearings Before the Sen. Public Works Comm.*, 94th Cong., 41 (July 27, 1976) (Testimony of EPA Administrator Russell Train), at App. 15.[10]

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[10] Although EPA's original definition did not expressly identify "wetlands" as "navigable waters," the agency contemporaneously issued a policy statement noting that wetlands "represent an ecosystem of unique and major importance to citizens of this Nation" which require

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After a short-lived, narrower Corps interpretation of "navigable waters" was criticized by EPA[11] and rejected by the courts,[12] today's more comprehensive definition was developed and refined. *See* Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Waters and to Their Adjacent Wetlands*, 34 Env. L. Rev. 10187, 10211 (2004) (explaining Corps' 1974 actions). Consistent with EPA's regulations and the statute's legislative history, the Corps revised its earlier definition to give the term its "broadest possible constitutional interpretation." 40 Fed. Reg. 19,766 (May 6, 1975) (citing S. Rep. No. 92-1236, at 144 (1972)).[13] That definition, finalized in interim form a few months later, included "[a]ll tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark," as well as wetlands that are "contiguous or adjacent to other navigable waters." 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975). Where necessary to protect

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"extraordinary protection." 38 Fed. Reg. 10,834 (May 2, 1973). Accordingly, EPA announced its policy to "preserve the wetland ecosystems and to protect them from destruction through waste water or nonpoint source discharges regarding protection of wetlands" and to "minimize alterations in the quantity or quality of the natural flow of water that nourishes wetlands and to protect wetlands from adverse dredging or filling practices." *Id.*

[11] *See* Letter from EPA Administrator Russell E. Train to Corps Lt. Gen. W.C. Gribble, Jr. (Jan. 15, 1974), at App. 24-27.

[12] *Natural Resources Defense Council, Inc. v. Calloway*, 392 F. Supp. 685 (D.D.C. 1975) (invalidating regulations promulgated at 39 Fed. Reg. 12115, 12119 (April 3, 1974)).

[13] The House Report contained similar language, noting that "[t]he committee fully intends the term "navigable waters" to be given the broadest possible constitutional interpretation." H.R. Rep. No. 92-911, at 131 (1972).

water quality, the Corps District Engineer would determine jurisdiction over intermittent rivers, streams, tributaries, and non-adjacent perched wetlands. *Id.* EPA simultaneously proposed complementary guidance for evaluating dredge and fill permit applications for discharge to wetlands. 40 Fed. Reg. 19,794 (May 6, 1975). EPA explained that the program would protect "wetlands which are especially valuable for propagation and support of fish and wildlife, as well as other beneficial uses ... [from] capricious development [that is] having a major impact on the aquatic life and wildlife of the United States, and other water uses." *Id.* These guidelines, which mirrored the Corps' regulations, were issued in interim final form a few months later. 40 Fed. Reg. 41,294 (Sept. 7, 1975).

Since adoption of these early implementing regulations, the agencies' interpretation of "navigable waters" has remained remarkably stable. In 1977, the Corps amended the definition of "navigable waters" in order to "make the policies and procedures more understandable to a person desiring to perform work in the waters of the United States." 42 Fed. Reg. 37,122 (July 19, 1977). The 1977 amendment did not expand the Corps' jurisdiction, but merely aimed to resolve confusion as to which waters were subject to jurisdiction, including wetlands adjacent to navigable waters or their tributaries, as well as other waters "the degradation or destruction of which could affect interstate commerce." 42 Fed. Reg. at 37,144.[14]

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[14] The 1977 clarification provided the first definition of "adjacent," defined as "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 42 Fed. Reg. at 37,144.

In 1979, the EPA issued the definition of "waters of the United States" that, with only minor modifications, remains in effect today. 44 Fed. Reg. 32,854, 32,901 (June 7, 1979); 33 C.F.R. § 328.3(a). In 1986, the Corps adopted the EPA definition. *See* 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986); 40 C.F.R. § 230.3(s). These definitions largely parallel the original 1975 and 1977 definitions.

In sum, the Corps and EPA have consistently interpreted the jurisdictional reach of the Clean Water Act's integrated and comprehensive pollution control programs, and the courts have largely followed suit. *See, e.g., United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005), *petition for cert. filed*, 74 USLW 3309 (U.S. Nov. 11, 2005) (No. 05-623) (wetlands drained by a ditch that ran into non-navigable creek that ran into non-navigable river, which in turn ran into navigable river are "waters of the United States"); *In re Needham*, 354 F.3d 340 (5th Cir. 2003) (drainage canal adjacent to navigable-in-fact water constitutes "navigable water"); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003) (wetland that drains intermittently into manmade waterway that empties 2.4 miles later into navigable-in-fact water subject to CWA jurisdiction); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) (wetlands adjacent to roadside ditch that eventually empties into navigable-in-fact waters subject to Clean Water jurisdiction); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (wetlands subject to Clean Water Act jurisdiction); *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979) (wetlands adjacent to lake are "navigable waters"); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978) (Clean Water Act jurisdiction extends at least to waters which are no longer subject to tidal inundation because of dikes). Such contemporaneous and long-standing administrative construction carries

special weight. *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 (1931).

B. If Adopted, Petitioners' Arguments Threaten to Disrupt the Clean Water Act's Cooperative Federalism Scheme and Unduly Burden the States.

The Clean Water Act, as originally drafted and subsequently implemented, does not impinge on any traditional area of state regulation, but rather, constitutes a classic example of cooperative federalism. The statute manifests Congress' embrace of a "partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)). By its explicit terms, the statute preserves and allocates substantial roles to state governments, but also provides for federal regulation of polluting activity. *See* 33 U.S.C. § 1342(b) (giving states the presumptive right to take over administration of the Act's discharge permit program); 33 U.S.C. § 1342(g) (similarly giving states the presumptive right to take over the federal "dredge and fill" program); 33 U.S.C. § 1370 (setting forth savings clause preserving state authority to protect waters more stringently than federally required). In many states, including the one at issue here, the federal-state partnership envisioned by Congress has become a working reality over the last thirty years, with federal and state water protection laws integrated into one "seamless" and streamlined regulatory process, reducing permit application costs and time. *See, e.g.*, Michigan ANPRM Comments at 14;

Delaware ANPRM Comments at 15; Vermont ANPRM Comments at 2.

Given these long-established regulatory relationships, many states oppose the shrinking of federal protection over the nation's waters. As Nebraska explained to EPA, "staggering economic difficulties for the states mean the additional burden would strain state resources and dramatically reduce our ability to protect the waters of the State." Nebraska ANPRM Comments at 1. *See also* Arizona ANPRM Comments at 3 ("Given the ongoing budget concerns of our state and many others, creation of such programs and partnerships is unlikely in the near future"); Montana ANPRM Comments at 5 ("A Federal basis of support for implementation of water quality protection efforts in Montana is critical in light of the state's limited regulatory resources."). Other states have expressed similar views. *See, e.g.*, California ANPRM Comments at 9; Maine ANPRM Comments at 1; North Carolina ANPRM Comments at 6; Wyoming ANPRM Comments at 5. To overturn thirty years of settled expectations here would, in effect, impose an enormous unfunded mandate on the states.

Even in the absence of budgetary woes, other practical constraints prevent states from filling EPA's and the Corps' regulatory shoes. In some states, regulatory agencies are actually forbidden from imposing any regulations stricter or more extensive than federal regulations. *See, e.g.*, Texas ANPRM Comments at 4. Elsewhere, the withdrawal of federal jurisdiction likely means that "a patchwork quilt of uneven regulations will threaten overall water quality." Indiana ANPRM Comments at 1-2. Moreover, the states themselves recognize that without the "level playing field" created by the Clean Water Act, many

states will feel economic pressure to engage in a race to the bottom, loosening water regulations to compete with other states. Delaware ANPRM Comments at 14; Tennessee ANPRM Comments at 2-3. But even individual states with adequate resources, legal authority and the political will to fill the void cannot regulate beyond their own boundaries, a serious limitation in the integrated watersheds of North America where virtually every state is affected by upstream polluting activities in another jurisdiction. There is thus no compelling reason for the Court to rewrite the statutory federal-state balance struck by Congress.

III. PETITIONERS' REAL ESTATE DEVELOPMENTS AND THE ACT'S PROTECTIONS BOTH IMPLICATE COMMERCIAL ACTIVITIES, OVERCOMING CLAIMED COMMERCE POWER CONCERNS.

These cases do not implicate legitimate constitutional concerns. The pervasively commercial real estate development activities at issue in *Rapanos* and *Carabell*, the Clean Water Act's protections of commercial activities dependent on America's waters, and the Corps' underlying regulatory judgments about Petitioners' impacts on water quality easily satisfy any constitutional test linked to the Commerce Clause. Petitioners' plans are reachable under both the "channels of interstate commerce" and the "substantially affect" interstate commerce rationales. They also involve "Necessary and Proper" assertions of federal power to protect legitimate federal interests.

First, unlike the isolated, unconnected waters at issue in *SWANCC*, the waters in these cases are protectable as part of the "channels of interstate commerce." *See United*

States v. Lopez, 514 U.S. 549, 558-59 (1995). Petitioners' actions involve the filling of wetlands that are proximate or directly connected to tributary ditches which act as conduits to traditional navigable-in-fact waters. The degradation of small stream tributaries can collectively harm agricultural, municipal, and riparian uses of such waters, as well as innumerable businesses dependent on interstate travelers who seek pristine fishing streams, small boat recreation, and swimming opportunities in waters often miles from traditional "navigable-in-fact" waters. *See, e.g.*, EPA Region 10 ANPRM Comments at 4-5. As Judge Posner observed in the factually similar *Gerke* case, "the sum of many small interferences with commerce can be large, and so to protect commerce Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act has a perceptible effect." *Gerke*, 412 F.3d at 806 (citations omitted).

Under the "channels" rationale, this Court has long recognized federal power to "insure the convenient and safe navigation of all the navigable waters of the United States," including efforts to "remov[e] . . . obstructions to their use." *The Daniel Ball*, 77 U.S. 557, 564 (1871). *See also United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 405 (1940) ("To make its control effective the Congress may keep 'the navigable waters of the United States' open and free and provide by sanctions against any interference with the country's water assets."). This power reaches to activities in non-navigable waters necessary to protect navigable-in-fact waters. *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941) (recognizing federal power under the Commerce Clause to reach watersheds due to their link to "flood control on navigable streams and their tributaries"). Once "channels

of interstate commerce" are implicated, congressional power can be asserted to "keep the channels of interstate commerce free from immoral and injurious uses," even where a defendant's conduct is itself not commercial. *Caminetti v. United States*, 242 U.S. 470, 491 (1917).

Second, under the third category of Commerce Clause power analysis, the federal government also has "the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. As the Court recently explained, Congress can even regulate "purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Gonzalez v. Raich*, 125 S. Ct. 2195, 2206 (2005). In assessing federal power under a category three Commerce Clause analysis, the Court looks to the particular activities being regulated as well as the commerce-related activities protected by the statute. *See, e.g., Raich*, 125 S. Ct. at 2209 (distinguishing *Lopez*, which involved a "brief, single-subject statute making it a crime for an individual to possess a gun in a school zone"); *United States v. Morrison*, 529 U.S. 598, 610 (2000) (explaining that "the noneconomic, criminal nature of the conduct at issue" in *Lopez* was "central" to the Court's decision there). In the recent *Raich* case, for example, the Court focused on how Congress' comprehensive regulation of the illegal drug market implicated commerce in numerous ways, contrasting the statute in *Morrison*, whose focus on gender-motivated crimes of violence "did not regulate economic activity." *Raich*, 125 S. Ct. at 2210-11.

The Clean Water Act's explicit text calls for Commerce Clause analysis of the activities causing harm, here polluting conduct, as well as commercial and economic activities dependent on the "chemical, physical and biological integrity" of America's waters. 33 U.S.C. § 1251(a). The factual setting of *Rapanos* and *Carabell*, where commercial real estate developers sought to fill wetlands for profit, undoubtedly involves the sorts of economic and commercial activity so completely lacking in *Lopez* and *Morrison*. Moreover, as the Court recognized in *Riverside Bayview*, adjacent wetlands and tributaries such as those at stake here fulfill numerous commercially and economically significant "hydrological" functions, thereby overcoming any commerce power objections. *See also Gerke*, 412 F.3d at 806-08 (rejecting similar constitutional attack and stating the "power of Congress to regulate pollution is not limited to polluted navigable waters"); *Deaton*, 332 F.3d at 704-08 (finding fill of wetlands flowing into ditch threatened "aggregate effects" with other similar actions and was reachable because action implicated "channels of interstate commerce"); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (analyzing the harmful activities regulated, the activities contingent on regulatory protection, and the need to reach intrastate activities as an essential part of a larger regulation of economic activity).

Regulation of the class of pollution discharges at issue here lies within the government's Commerce Clause power because it is part and parcel of a "comprehensive" regulatory scheme intended to control polluting harms and protect the manifold uses of America's waters. *Raich*, 125 S. Ct. at 2206 ("the *de minimis* character of individual instances arising under [the] statute is of no significance"). As it did in *Raich*, the Court should decline entreaties to

"excise individual applications of a concededly valid statutory scheme." *Id.* at 2209. These cases are unlike *Lopez* and *Morrison*, where the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. *Id.*

Finally, the federal government also can protect downstream commercial and economic uses of waters pursuant to the Necessary and Proper Clause, which allows "Congress 'to take all measures necessary or appropriate to' the effective regulation of the interstate market, 'although intrastate transactions . . . may thereby be controlled.'" *Raich*, 125 S. Ct. at 2218 (Scalia, J., concurring). Congress has the power to "facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants," even where the activity is "noneconomic." *Raich*, 125 S. Ct. at 2216, 2217 (Scalia, J., concurring) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937)).

Petitioners' constitutional arguments thus rest in their entirety on taking a few clauses in *SWANCC* out of context, while virtually ignoring *Raich*, and claiming, in effect, that *SWANCC* rewrote well-established Commerce Clause precedents. The *SWANCC* Court alluded to potential Commerce Clause concerns under its particular facts, but declined to analyze the "object or activity that, in the aggregate, substantially affects interstate commerce," apparently questioning the timeliness of government arguments. *Id.* at 173. In light of constitutional concerns, the *SWANCC* Court merely read the statute as not encompassing regulation under the "Migratory Bird Rule." *Id.* at 173-74. The cases now before the Court, in contrast, do not involve isolated ponds, and do not now rely on the

Migratory Bird Rule, but involve private commercial real estate development, with fill into "adjacent wetlands" and tributaries that are significantly different in their locations and commercial functions from the isolated *SWANCC* waters. Much as this Court in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 275-83 (1981), rejected a Commerce Clause attack on a federal mining law because that law involved underlying commercial activity causing harms, market competition that could spur destructive activity, and many beneficial uses of resources potentially threatened by mining harms, the Court should similarly reject Petitioners' misguided constitutional arguments here.

IV. AS THE COURT RECOGNIZED IN *RIVERSIDE BAYVIEW*, DEFERENCE TO THE AGENCIES' REGULATORY INTERPRETATIONS AND ECOLOGICAL JUDGMENTS IS WARRANTED.

Petitioners' claims boil down to an attack on the statutory interpretations and regulatory judgments of the Corps and EPA. Those agency judgments consist of both longstanding regulatory interpretations and site-specific assessments about Petitioners' particular lands, waters, and planned activities. It is for the implementing agencies, not the courts, to define the "precise bounds of regulable waters" by exercising their "ecological judgment about the relationship between waters and their adjacent wetlands." *Riverside Bayview*, 474 U.S. at 134. The exercise of that ecological judgment is precisely what occurred in these cases. As it did in *Riverside Bayview*, the Court should defer to the agencies' scientific judgments and "technical expertise" about "biological functions" and the "aquatic environment" under the principles set forth in *Chevron*

U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984). *Id.* at 131, 134.

Petitioners advance two slightly different, but equally unpersuasive, rationales for overriding the Court's prior conclusion in *Riverside Bayview*. In *Rapanos*, Petitioners argue that some greater hydrologic connection than the one determined by the Corps to exist in this instance is necessary to establish Clean Water Act jurisdiction. They posit that a closer geographic proximity between tributaries and downstream navigable-in-fact waters is required, but they offer neither an appropriate test for determining acceptable proximity nor any legislative, regulatory or judicial support for their position. In reality, the hydrologic connection that the Court discussed at length in *Riverside Bayview* was not spatial or geographic, but functional. *See Riverside Bayview*, 474 U.S. at 132-35. If the courts begin usurping the proper role of the agencies in determining these functional hydrologic connections at particular sites, they will likely find themselves in the line-drawing business for many years to come.

The *Carabell* Petitioners pursue a different tack, asking the Court to second-guess the ecological judgment of the Corps with respect to the ability of their man-made berm to isolate an admittedly adjacent wetland and thereby cut off Clean Water Act jurisdiction. This Court firmly rejected such a case-by-case approach in *Riverside Bayview*, upholding agency jurisdiction over the *class* of adjacent wetlands because the Corps "has concluded" that such wetlands "*may function* as integral parts of the aquatic environment." *Riverside Bayview*, 474 U.S. at 135 (emphasis added). The Court was untroubled that some adjacent wetlands might not be "significantly intertwined with the ecosystem of adjacent waterways." *Id.* at 135,

fn.9.[15] It was enough that such waters "*tend* to drain" into waters, "*may serve* to filter and purify water draining into adjacent bodies of water," or "*may serve*" important biological functions. *Id.* at 134-35 (emphasis added). The Court's holding in that case and the basic principles of *stare decisis* dictate the same result here.

CONCLUSION

The decisions of the Sixth Circuit Court of Appeals in these consolidated cases should be affirmed in their entirety.

Dated: January 13, 2006

Respectfully submitted,

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[15] If in any particular case the filling of an adjacent wetland will not appreciably impact water resources, the developer can simply obtain a section 404 permit and proceed.

SECTION 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

HEARINGS
BEFORE THE
COMMITTEE ON PUBLIC WORKS
UNITED STATES SENATE
NINETY-FOURTH CONGRESS
SECOND SESSION

JULY 27 AND 28, 1976

SERIAL NO. 94-H49

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SECTION 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

TUESDAY, JULY 27, 1976

U.S. SENATE,
COMMITTEE ON PUBLIC WORKS,
Washington, D.C.

The committee met at 7:12 p.m., pursuant to call, in room 4200, Dirksen Senate Office Building, Hon. Jennings Randolph (chairman of the committee) presiding.

Present: Senators Randolph, Muskie, Burdick, Hart, Baker, and Domenici.

OPENING STATEMENT OF HON. JENNINGS RANDOLPH, U.S. SENATOR FROM THE STATE OF WEST VIRGINIA

Senator RANDOLPH. Good evening, ladies and gentlemen.

The Committee on Public Works this evening and also tomorrow evening will conduct two hearings on a difficult subject as we review the environmental problems with which the Congress is faced.

We hope to further our understanding of the problem or problems and to receive recommendations for an effective resolving of these issues.

The situation has arisen, as members of the committee know, from the Water Pollution Control Act Amendments of 1972, section 404 of that legislation requires the Army Corps of Engineers to issue permits for the disposal of dredge and fill material in our navigable waters.

When we wrote the act, we were concerned primarily or even solely with controlling the way in which these materials were disposed. Dredge and fill materials often are highly contaminated, and thus a situation should be addressed in the terms of water pollution control.

All the members of the committee have expressed an interest in this subject, and we are appreciative that many of them arranged their schedules to be here tonight.

We did not understand earlier that a judicial decision would subsequently broaden the impact, as I have referred to it, of section 404. As a result of the action in the courts, the Corps of Engineers has set down regulations covering an extensive range of activities. These are proposed to be

implemented in three phases. The first phase has already gone into effect. The regulations covering phase two were to have been implemented on July 1, but were ordered postponed by the President pending action in the Congress.

These hearings have been planned by the committee to review the implication of the Corps of Engineers' regulations. Legislation has been adopted by the House of Representatives, and there are proposals pending in the Senate.

The witnesses counseling with us during these two evenings represent a broad spectrum of affected parties. I am sure all members of the committee welcome the opportunity to hear the witnesses and discuss with them in dialog the problems that we know are necessary to be discussed. The exchange, I am sure, between members of the committee and those who testify will be helpful, as well as the formal statements.

Senator Robert Dole of Kansas is at the witness table. We are prepared to hear his testimony at this time.

Are there comments from members of the committee? Senator Muskie?

OPENING STATEMENT OF HON. EDMUND S. MUSKIE, U.S. SENATOR FROM THE STATE OF MAINE

Senator MUSKIE. I have a brief statement which I hope will be helpful. I had hoped that the Senate could defer until next year consideration of the substantive issues associated with the 1972 Clean Water Act.

Unfortunately, much of the debate, much of the regulations, and much of the suggested legislative responses stem from what I regard as a misinterpretation of congressional intent.

Section 404 is designed to require the corps, because of their existing authority to maintain navigation, to regulate the dumping of polluted dredge spoil at specified disposal sites, the EPA having veto power over the selection of the sites. That was the intent precisely and specifically stated.

Section 404 was an exception to the otherwise comprehensive regulatory program embodied in section 402. But implementation of section 404 has not led to the end of open water dredge spoil discharge, which was the specific objective of section 404.

No specified disposal sites have been established. Instead, the section 404 regulations have led to confusion, irritation, and divisiveness that have undermined the confidence in the basic Federal role in water pollution control.

They have created a perception of needless interference in the affairs of farmers, foresters, miners, and ranchers whose activities were by no means comprehended as coming under the section of 404 when it was written.

At this point, the most appropriate course of action for this committee may be to strike section 404, eliminate this exception, and return to the basic regulatory structure anticipated by the act.

If we adopted this course, dredge, spoil, and fill would be considered pollutants. Where they are discharged, they would be regulated by the Environmental Protection

Agency or the States. Where they are nonpoint sources, they would be regulated by the States pursuant to section 208. This was the original position of the Senate in 1972.

Given all the problems that section 404 has created, perhaps it should be in its saddest position now. I am not wedded to this position, My mind is open, whatever my emphasis may indicate to the contrary.

I hope the statements of our witnesses will help clarify these issues and provide us with a course of action which will preserve our ability to regulate the disposition of polluted dredge spoil without creating another unnecessary duplicated Federal regulatory program.

Senator RANDOLPH. Thank you Senator Muskie, for your continuing leadership on the committee. We are grateful as members of our committee and the Senate as well.

Senator Baker, do you have any comments?

Senator BAKER. Mr. Chairman, I have no prepared statement at this time. Possibly I will have suggestions to make as we proceed. But I prefer to hear the testimony of the witness.

Senator RANDOLPH. Thank you, Senator Baker.

Senator Hart?

OPENING REMARKS OF HON. GARY HART, U.S. SENATOR FROM THE STATE OF COLORADO

Senator HART. Mr. Chairman, I have no prepared statement. As with other members of the Senate, I have my own proposal which I will be discussing with this

committee and perhaps the full Senate on section 404 to deal with problems that Senator Muskie has so articulately identified.

It is a classic of a case that all of us in the Congress are faced with time and time again: the congressional intent and administrative implementation, between which there seems to be a gap.

The people of the country are upset. We are upset. Somehow the Congress and the executive branch must get together on the laws that are passed and implemented to free the people of this country from what they definitely consider to be burdensome regulations.

I think all of us have the same intent. We are here to try to solve that problem.

Senator RANDOLPH. Thank you, Senator.

Senator Domenici?

Senator DOMENICI. I have no comments, Mr. Chairman. Thank you.

Senator RANDOLPH. For the record, Governor Marvin Mandel of the State of Maryland had indicated to the committee that he would appear this evening and would address himself to the subject matter, not as a Governor of that State but for the National Governors' Conference.

The change of time and other commitments made it impossible for Governor Mandel to be with us tonight. He has submitted testimony which will be a part of our record. Did the Governor provide copies so that they might be available to those who will be covering the hearing or interested parties? Do you have knowledge of that?

Mr. MEYER.[1] Yes, sir.

Senator RANDOLPH. There are copies, then.

[The statement of the National Governor's Conference follows]

* * *

Russell Train, Nathaniel Reed, Victor Veysey, and Peter Taft – are men of stature. They are men who have certain authority and leadership which we all recognize, I am sure that their testimony will bring forth colloquy which will help to bring out the points of view they present.

Would you gentlemen please come forward as a panel?

Thank you, gentlemen.

Off the record.

[Discussion off the record.]

Senator RANDOLPH. The members of the panel, as I have indicated, are men of stature and leadership. Mr. Train, would you proceed to give us your thinking as the Administrator of the Environmental Protection Agency?

STATEMENTS OF RUSSELL TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; NATHANIEL REED, ASSISTANT SECRETARY OF THE INTERIOR FOR FISH AND WILDLIFE AND PARKS; VICTOR VEYSEY, ASSISTANT SECRETARY OF ARMY FOR CIVIL WORKS ; AND PETER TAFT, ASSISTANT ATTORNEY GENERAL FOR LAND AND NATURAL RESOURCES

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[1] Mr. Barry Meyer, Chief Counsel, Senate Public Works Committee.

Mr. TRAIN. Thank you, Mr. Chairman and members of the committee. I have what at least seems to me in comparison to some of the other statements a relatively short statement. Since I come first, I propose to read the full statement, with your permission. Since Governor Mandel is not appearing, perhaps I can use, part of his time, although we may not say the same thing.

I am here today to discuss with you our continuing efforts to achieve the goals of the Federal Water Pollution Control Act in the context of one specific program – the regulation of discharges of dredged or fill material under section 404.

Needless to say, I am just delighted that this committee has called this hearing. I think that this has been long overdue. The issues are complex. They need resolution. I think the fact that the committee is willing to gather at this late hour to take up this issue is just extraordinarily commendable. The amount of interest which is evident in the size of the audience here I think speaks to the importance of the issue in the public mind.

With the passage of the 1972 amendments to the FWPCA, our fundamental objective became the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters.

Full implementation of the 404 decisionmaking process is imperative if we are to achieve that goal. Section 404 represents an essential tool for moderating the degradation, and sometimes the irrevocable destruction, of aquatic areas that naturally control the quality of water, including those vital areas of shallow water known as wetlands.

I might add that if we did not have those wetlands, the course of abating pollution in this country by industry and municipalities would be enormously increased because of the additional costs that would be required by the technology to take the place of what nature has provided us.

We welcome the opportunity to participate in dispelling the widespread misinformation that continues to impede constructive debate on this program.

I will direct my brief remarks to three concerns: First, the origin of the program and the much talked about concept of "broad jurisdiction over water"; second, a few of the ecological realities that compel Federal jurisdiction over water; and finally, I will highlight the encouraging first year of implementing a program that is designed to overregulation.

The Federal Water Pollution Control Act places the responsibility upon EPA to administer a permit program for industrial and municipal discharges. The act reserves to the Corps of Engineers a separate permit program under section 404 for discharges of dredged or fill material into the Nation's waters.

The statutory language authorizing the 404 program requires the cooperation of the corps and EPA to insure that discharges of dregded [sic] material and fill material will not have unacceptable adverse effects on municipal water supplies, shellfish beds, fisheries, wildlife, and recreation.

A fundamental element of the Water Act is broad jurisdiction over water for pollution control purposes. Several Federal courts have endorsed the wisdom, and constitutionality, of this committee's observation that:

> Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

In affirming the constitutionality of the statute's jurisdiction over all the Nation's waters in the Ashland Oil opinion, the Court of Appeals for the Sixth Circuit observed:

> We believe that the language of the Federal Water Pollution Control Act and its legislative history show that the United States Congress was convinced that uncontrolled pollution of the Nation's waterways is a threat to the health and welfare of the country, as well as a threat to its interstate commerce.
>
> Obviously water pollution is a health threat to the water supply of the Nation. It endangers our agriculture by rendering water unfit for irrigation. It can end the public use and enjoyment of our magnificent rivers and lakes for fishing, for boating, and for swimming. These health and welfare concerns are, of course, proper subjects for Congressional attention because of their many impacts upon interstate commerce generally. (*United Slates v. Ashland Oil*, 7 ERC 1114, 1120 (6th Cir., 1974).)

The court recognized that comprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless Federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not

be required to comply with the same procedural and substantive standards imposed upon their downstream competitors.

Thus, artificially limiting the jurisdiction can create a considerable competitive disadvantage for certain discharges.

Let me add at this point, Mr. Chairman, that the administration supports the approach of maintaining broad jurisdiction under this program, as set forth under the so-called Cleveland-Harsha amendment offered in the other House, with appropriate amendments.

I believe Mr. Veysey will be prepared to go into more detail on this. But let me just mention in passing that such amendments should provide for delegation to the States under carefully drawn criteria. They should provide for authorization to the Corps of Engineers to exclude insignificant activities. They should insure that permits will only be denied on the basis of adverse impacts on fish and wildlife or other water quality concerns. They should exempt inuse agricultural or silvicultural activities, as would be carefully defined in detail in legislative language.

Mr. Chairman, continued applicability of the 404 program to our Nation's waters is essential if we are to moderate the two most significant types of harm caused by dredged or fill material.

First, just as water uses are degraded by industrial and municipal wastes, adverse effects also occur from dredged and fill materials that contain a wide range of pollutants, including toxic substances.

An initial screening of sediments from over 700 harbor and waterway locations showed that sediments in over

half of the locations contained a significant pollutant load. Pollutants identified in the sampling included lead, arsenic, cyanide, PCB's, mercury, and cadmium.

Contaminated materials threaten water supplies, fisheries and other beneficial water uses unless carefully managed. The corps and EPA are currently using the 404 decisionmaking process to assess the risk of dredging James River sediments that are contaminated with Kepone.

It is important to understand that toxic substances threaten the aquatic environment when discharged into small streams or into major waterways. Similarly, pollutants are available to degrade water and attendant biota when discharged in marshes and swamps, both below and above the mean and ordinary high water marks.

Second, unlike most industrial and municipal pollution, dredged and fill material can physically destroy essential parts of the aquatic system, including swamps, marshes, submerged grass flats and shellfish beds. These critical aquatic areas are essential to many water uses, not the least of which is a viable commercial and sports fishery.

Wetlands serve as spawning and nursery areas while providing natural control of organic and inorganic nutrient transfers that dictate quantity and quality of life in the water. The declining availability of swamps, marshes, and free-flowing streams to assimilate pollution from point and nonpoint sources will greatly increase the dollar and energy costs of maintaining desirable water uses.

For example, discharge of fill material into certain swamps in New York and New Jersey can affect the

quantity and quality of water seeping into the aquifers from which many communities draw their water supply, thereby naturally causing increased treatment costs.

We testified in the July 1975 hearings before the House Subcommittee on Water Resources that the Army Corps of Engineers and EPA had agreed to cooperate in establishing a joint program.

Shortly thereafter, interim final regulations were promulgated by the corps on July 25, 1975. These regulations were followed by the publication of interim final guidelines by EPA on September 5, 1975.

Together the regulations and guidelines establish a manageable program that focuses the decisionmaking process on significant threats to aquatic areas while avoiding unnecessary regulation of minor activities.

The first year of implementation of the 404 program ended just last Sunday. In view of the attention that has been given to this program in recent months and the misunderstandings that have been voiced by various interest groups, I want to discuss briefly the key features of the program that are preventing overregulation.

First, comprehensive jurisdiction is, we believe, essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrealted [sic] and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.

Moreover, this broad geographical jurisdiction should reduce the confusion and expense inherent in earlier jurisdictional approaches that established artificial and

often arbitrary boundaries that included only part of some bodies of water.

For example, the old jurisdictional mean high water line excluded one-half to one-third of most coastal marshes, thus possibly allowing destruction of an essential element of the aquatic system, depending on the degree of control exercised by the States.

Today this problem has been eliminated. The location of a coastal marsh by using the aquatic vegetation line accurately identifies most marsh areas. One Florida developer informed us that with the new approach, the location of coastal marshes is less time consuming and less expensive. No longer is it necessary to expend thousands of dollars for tide experts and surveyors to establish the exact mean high water mark as required by the old Corps program.

Second, let me emphasize that while the geographical jurisdiction of the program is broad, hundreds of activities have been identified which do not require permits. The term "fill material" has been defined so as clearly to exclude normal farming, silvictulure [sic] and ranching activities such as plowing, cultivating, seeding, and harvesting. Maintenance of existing fill has also been excluded.

We hope this hearing will help us reassure the public that many activities simply do not require permits.

Third, the 404 program will use general permits to the maximum extent possible to authorize categories of discharge that cause only minimal harm to water quality.

Thus, the need for dischargers to apply for individual permits is eliminated except in those instances involving environmentally significant activities. Several districts

have already issued general permits to authorize erosion control bulkhead and fill and for fills associated with highways and log roads.

Several of our regions have reported a sharp decrease in the number of public notices for permits for insignificant activities under both the 404 program and the 1899 Rivers and Harbors Act.

Fourth, phased implementation of the broad jurisdiction over water has provided a measure of moderation and flexibility we all see as necessary to a reasonable program. A commendable management effort by the Corps of Engineers has already resulted in improved coordination with EPA, other Federal and State agencies, and the public.

I would like to emphasize, I think the Corps has done an outstanding job in moving this program forward and developing reasonable and manageable regulations. You certainly can explore that more fully with them. But I want this committee to know that EPA is strongly supportive of the Corps' effort in this regard and believe that they really have done an outstanding job.

Finally, considerable effort has been made in developing a 404 program that would directly involve the States in the decisionmaking process. Several States with existing permit programs to regulate the same types of activities that are regulated under section 404 are taking advantage of the opportunity to participate in the joint processing Federal-State permit applications.

Iowa, Michigan, and Maryland are notable examples. I believe this opportunity to establish joint programs will encourage needed improvement in many States that have not yet adequately addressed environmental problems

caused by discharging dredged or fill material into the water environment.

To conclude my remarks, let me emphasize that the protection of water quality must encompass the protection of the interior wetlands and smaller streams.

In this regard, I should remind you that through the International Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter and our own Ocean Dumping Act of 1972, the United States has established both international and domestic programs to protect the oceans from uncontrolled discharges of sludges and dredged material.

The criteria for permitting the ocean dumping of dredged or fill material are, by design, consistent and very similar to those issued under section 404(b). Without an appropriate and effective program under section 404, only ocean dumping of dredged material will be closely regulated while many of our more productive and more limited inland water resources will be unprotected from both chemical and physical degradation.

The Department of the Interior has estimated that almost half of the wetlands which originally contributed to aquatic resources of our Nation have already been lost through draining, dredging, or filling.

Even with numerous programs aimed at their preservation, in excess of 25,000 acres of prime wetlands are lost each year. Our most productive aquatic systems have already been drastically reduced from their original 127 million acres to less than 80 million acres.

As you know, wetlands are a priceless, multiuse resource. They perform the following services:

One: High yield food source for aquatic animals;

Two: Spawning and nursery areas for commercial and sports fish;

Three: Natural treatment of waterborne and airborne pollutants;

Four: Recharge of ground water for water supply;

Five: Natural protection from floods and storms; and

Six: Essential nesting and wintering areas for waterfowl.

We should be mindful of the fact that when these areas are polluted out of existence, we will have lost the very valuable free service of nature; and if toxic-laden dredged or fill material is discharged into wetlands, we risk poisoning the very foundation of our aquatic system.

I must caution against expedient short-term considerations relating to the section 404 program, however compelling they may seem, in view of the long-term consequences associated with any such actions. What we do now affects not only the next decade but our next generation, and those that follow.

I mentioned at the beginning, Mr. Chairman, that there has been a lot of misinformation about this program. We believe the program has been managed in a way to avoid the kind of problems that you rightly are concerned about and that many members of the public are concerned about.

I am also concerned that misinformation and misguided advice has been put forward not on behalf of those frequently referred to, such as small farmers who we believe are totally excluded from the scope of these regulations, but by those

who wish to dredge and fill and develop wetlands to make a fast buck, if you will, at the expense of a long-term public interest.

I make that statement with full concern for the complexity of the problem. But I think that the wetland resource of this Nation is so vitally important to all of us that I would urge and beg this committee and the Congress to legislate in this area with the utmost care.

Again I commend the committee for conducting this hearing.

Senator RANDOLPH. Thank you very much, Administrator Train. If agreeable to the members of the committee, I would suggest that we have our four panelists give their presentation and then we go to the questioning.

Senator MUSKIE. Could I ask one question? I agree with that, Mr. Chairman. Could I ask one question simply to fill in on the history of the thing so it is clear?

Senator RANDOLPH. Yes.

Senator MUSKIE. The regulations which you have described, Mr. Train, are those issued a year ago this summer. What created the initial storm in section 404 was the policies that the Corps of Engineers announced in a press release issued after the court opinion; is that not so?

Mr. TRAIN. I believe that is correct. Mr. Veysey should answer that.

Senator MUSKIE. In other words, what created the initial storm of public opinion was a policy announced before you moved in, or somebody moved in, to redefine the policy in a more careful way you have described.

If the Corps had not, in other words, moved as it had with what I thought was distortion of legislative intent and created all of the reaction, you would not have had to move in as sort of the wet nurse to try to bring the storm under control.

That is the context in which your regulations were issued, as I recall. You may not, use the rhetoric that I just used, but isn't it a fact –

Mr. TRAIN. I think I will ask Mr. Veysey to respond to the question.

Senator MUSKIE. Isn't it a fact that the public relations problem which has brought all these people into this room at a late hour in the night, stirred up an issue by a release issued by the Corps of Engineers following the court opinion, before the careful definition of the regulations which you have described?

I wrote you a letter myself in that interim.

Mr. TRAIN. I remember practically the day that was issued. I was before another Senate committee on another matter. I was immediately confronted. In fact, I hadn't read the release at that time. And there was no question that the release contributed to a climate of public concern over the issue.

Senator MUSKIE. It didn't contribute; it created.

Mr. TRAIN. But I would say that the Corps of Engineers was by no means the only instrument for increasing public concern over the program.

Senator MUSKIE. I understand the Secretary of Agriculture participated.

Mr. TRAIN. Yes.

Senator MUSKIE. The Secretary of Agriculture, I think, cooperated very well with the Corps of Engineers. I just wanted to make that point because after your description, it sounded as though the problem had started with the regulations, where it actually started before.

If it had started with the regulations, conceivably there might not be a problem.

But the impression created by the release of the Army Engineers is still creating ripple effects in every State that is affected by the problem, and I suspect many of the refinements of your regulations have not yet caught up with those ripple effects to help abate the storm. That is my only point.

Mr. TRAIN. I must say I suspect that those who feel that their interests are threatened by 404 would have created a public storm over this issue, irrespective of any possible contribution from that press release.

Senator MUSKIE. We will make our independent judgments about that.

Mr. TRAIN. I wouldn't want to point a finger to the Congress on that. In any event, that is water over the dam.

Senator MUSKIE. Was the dam built with a permit?

Mr. TRAIN. I think with that I shall yield.

STATEMENT OF VICTOR VEYSEY, ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS

Mr. VEYSEY. Mr. Chairman, if I might, I would like to respond in part to Senator Muskie's question, which I think is an appropriate one.

Since there is no part of that included in my testimony, I welcome the opportunity to insert it at this point. It is true, it is a sad fact, that sometime in the early hours on a long weekend when folks in the Corps of Engineers had been struggling with this problem, perhaps too long, a very misguided and very unfortunate press release was issued which said, if read very carefully, that under this law, many things might happen. That was before the regulations were written.

In a sense, it was true that a lot of things might happen, although there was no intent on the part of the Army Corps of Engineers or EPA to let any of those things happen. But the damage was done, as you point out so correctly. That stirred or perhaps struck a sympathetic note – I don't know which – but anyway, the release was issued from the Public Information Office of the Corps of Engineers. I guess we will never be permitted to forget that.

Senator MUSKIE. Neither will we.

Mr. VEYSEY. I regret very much that it did happen. After that time we took a rather firm grip on the situation.

I will say that with magnificent cooperation from Russ Train and all of his people at EPA, and the Interior and the Justice Depart-

* * *

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 19 1974

THE ADMINISTRATOR

Dear General Gribble:

As you are undoubtedly aware, on March 13, 1974, the U.S. District Court for the Middle District of Florida issued a Memorandum Opinion in *United States v. Holland*. In that case, the United States sought to enjoin disposal without a permit of dredged material in wetlands which were above the mean high water line but were periodically inundated by tidal waters. The court held, *inter alia*, that wetlands above the mean high water line are subject to Federal jurisdiction under Section 404 of the Federal Water Pollution Control Act, as amended (the "FWPCA") and that discharges of dredged material into such areas "constituted discharges entering 'waters of the United States'."

The result reached in *U.S. v. Holland* is a jurisdictional milestone under the FWPCA. Wetlands above, and below, the mean high water line are of vital importance to our environment. The Corps has taken an admirably firm position to protect wetlands below the mean high water line. Recently issued Corps regulations stated that: "As environmentally vital areas, [wetlands] constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest." 33 CFR Section 209.120(g)(3). Our concern is that similar protections be provided for wetlands above the mean high water line.

We believe that the *Holland* decision provides a necessary step for the preservation of our limited wetland resources. Moreover, we are firmly convinced that the court properly interpreted the jurisdiction granted under the FWPCA and Congressional power to take such a grant.

Notwithstanding the decision in *U.S. v. Holland* and the recognized importance of wetlands to the environment, we have been informed that the Corps has declined to acquiesces in the *Holland* decision and has advised Corps installations not to accept applications for permits under FWPCA Section 404 for dredge and fill disposal in these areas. The Department of Justice has taken the position that it will not bring enforcement action against persons disposing of dredged or fill material to wetland areas without Section 404 permits so long as the Corps refuses to issue such permits. As a consequence, wetland areas above the mean high water line are presently unprotected from the irreparable damage caused by the disposal of dredged and fill materials.

So that this important and irreplaceable part of the environment will not go unregulated, I strongly urge the Corps of Engineers to reconsider its position and to commence processing Section 404 permits for wetlands above the mean high water line immediately. I would appreciate the opportunity to discuss this matter with you at your earliest convenience.

A separate but related matter also requires attention. On April 3, 1974, the Corps of Engineers promulgated final regulations with respect to Corps permits for various activities in navigable or ocean waters. 39 Federal Register 12115. Among other things, these regulations set forth certain procedures for the issuance of permits for the

disposal of dredged or fill material under Section 404 of the FWPCA.

Of particular concern to the Environmental Protection Agency is the definition of "navigable waters" set forth in these regulations, 33 CFR Section 209.120(d)(1). In proposed regulations published on May 10, 1973 (38 Federal Register 12217), the Corps proposed to define the term "navigable waters" to mean "waters of the United States, including the territorial sea," in accordance with the definition of "navigable waters" in the FWPCA. The final regulations promulgated on April 3, 1974, deleted the previous definition of "navigable waters" and substitutes therefor the following:

> "The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce (See 33 CFR 209.260 for a more complete definition of these terms)."

The preamble to the final regulation discusses the Corps' reasons for changing the definition and makes it clear that the term "navigable waters of the United States" as used in the Rivers and Harbors Act of 1899 and the term "navigable waters" as defined in the FWPCA are to be "created synonymously." The preamble and the reference to the Corps' definitional regulation at 33 CFR 209.260 make it clear that the Corps intends to delineate FWPCA Section 404 jurisdiction on the basis of court decisions and Corps interpretations of "navigability." Our interpretation of "navigable waters" within the meaning of

the FWPCA does not conform to the Corps' recently issued regulation. We firmly believe that the Conferences Committee deleted "navigable" from the FWPCA definition of "navigable waters" in order to free pollution control from jurisdictional restrictions based on "navigability." Indeed, as the Conference Report states with respect to the modified definition of "navigable waters": "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. 92-1236, 92d Cong., 2d Sess. at 144. Perhaps a meeting of the appropriate personnel of the Corps and of EPA should be scheduled to resolve these discrepancies.

Sincerely yours,

/s/ John Quarles
Russell E. Train
Administrator

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Consolidated Cases Nos. 04-1034 and 04-1384

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IN THE

Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; and PINE RIVER BLUFF ESTATES, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

JUNE CARABELL; KEITH CARABELL; HARVEY GORDENKER; FRANCES GORDENKER,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Writs of Certiorari to The United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, NATIONAL ASSOCIATION OF REALTORS®, UTILITY WATER ACT GROUP, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Rapanos v. United States

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does the extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress's constitutional power to regulate commerce among the states?

Carabell v. U.S. Army Corps of Engineers

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States"?

2. Do the limits on Congress's authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States"?

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